No. 20121, 20122

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and L. E. DIXON COMPANY, *Appellants,*

vs.

VAN HARRIS, an individual, doing business as Harris & Sons, *Appellee.*

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and L. E. DIXON COMPANY, *Appellants,*

vs.

PARAMOUNT TRUCK RENTAL, INC., and VAN HARRIS, an individual doing business as Harris & Sons, *Appellees.*

PARAMOUNT TRUCK RENTAL, INC., *Appellant,*

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and L. E. DIXON COMPANY, *Appellees.*

On Appeal From the United States District Court for the Southern District of California, Central Division.

REPLY BRIEF OF APPELLEE PARAMOUNT TRUCK RENTAL, INC.

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I.

JURISDICTIONAL STATEMENT.

Appellee adopts the jurisdictional statement contained in the Opening Brief of Appellants L. E. Dixon Company (hereafter "Dixon") and Fidelity and Deposit Company of Maryland (hereafter "Fidelity").

II.
STATEMENT OF CASE.

The relevant documentary and oral evidence adduced at the trial of this action shows and the Court below found as follows:

1. On or about December 22, 1961, the United States of America through the National Aeronautics and Space Administration (hereafter NASA) entered into a written contract [Pltf. Ex. 1] with California Institute of Technology (hereafter CIT) whereunder CIT agreed to operate the Jet Propulsion Laboratory at Pasadena, California (hereafter JPL) and to furnish all the scientific, engineering, technical and other personnel, labor and services necessary for the management and operation thereof [Pltf. Ex. 1, p. 3]. Page 4 of said contract describes the services CIT agrees to render once the proposed laboratory is completed and subparagraph 2 on page 4 thereof provides that CIT "may, when authorized by Task Orders or Task Order Amendments, enter into subcontracts for the construction of facilities authorized by approved Construction of Facilities Projects."

2. On or about June 18, 1962, pursuant to a task order issued by NASA, CIT entered into a written contract with Dixon by the terms of which Dixon agreed to construct the Central Engineering Building at JPL [Pltf. Exs. 7 and 8]. Part 1, division 4, page 5 of plaintiff's Exhibit 8 specifically requires that Dixon furnish a Surety Bond to secure "payment in full of the claims of all persons performing labor upon or furnishing materials to be used in the construction of the building. . . ."

Part III, Div. 2, p. 24, of the Specifications [Pltf. Ex. 8] of the contract between CIT and Dixon provides that "all subcontractors, manufacturers or suppliers' equipment used in or a part of the work . . . shall be deemed obtained by CIT as the Agent of the Government."

3. Thereafter, and in compliance with said bonding requirement, Dixon, as principal, and Fidelity, as surety, executed a payment bond [Pltf. Ex. 2] in the amount of approximately $2,500,000 binding themselves to "promptly make payment to all persons supplying labor and material in the prosecution of the work provided for" in Dixon's contract with CIT. The United States and CIT are named as joint obligees on said bond.

4. Thereafter, on or about June 18, 1962, Dixon prepared and sent to Mr. Van Harris, doing business as Harris and Sons (hereafter "Harris") its proposed written subcontract [Pltf. Ex. 3] whereunder Harris is to furnish all labor, material and equipment and perform all work necessary to complete demolition, rough grading, excavating, fills and backfilling concerning the proposed Central Engineering Building at JPL for a total price of $22,900. Paragraph 11 of that contract provides: "Subcontractor agrees whenever notified by the Contractor (either before the commencement of the work or at any time during the progress of the work) to furnish to the contractor a Faithful Performance and Labor and Material Bond in favor of the Contractor and in an amount equal to the specified sum to be paid by the Contractor to the Subcontractor under this Subcontract, which bond shall be given by the Subcontractor as principal and a corporate surety licensed

and authorized by law to write and issue such bonds in the State where the work is to be performed; the premium on said bond may be added to the sum due to the Subcontractor under this Subcontract". Dixon did not require Harris to furnish such a bond to it.

5. On or about June 20, 1962, Harris returned by mail to Dixon its subcontract signed by him, along with Harris' letter of even date [Pltf. Ex. 5] stating in part:

> "I also explain that for the furtherance of the completion, it would be necessary to have one sub-contractor on this project and as there were no objections, I have made arrangements for this. With this letter attached to and a part of this sub-contract, I inclose (sic) herewith, the signed yellow copy [of the Dixon subcontract] as requested."

Harris had informed Dixon prior to sending this letter that he intended to use one subcontractor on the project [Reporter's Transcript (hereafter R. T.) pp. 28-29].

6. Approximately two weeks prior to sending this letter [Pltf. Ex. 5] to Dixon, Harris had negotiated with Andrew Yost (hereafter "Yost") an agreement whereby Yost agreed to do all the work that Harris subsequently contracted to do for Dixon for $16,525 or approximately $6,500 less than Harris' price to Dixon [R. T. pp. 104-105; 31-32].* Contrary to the assertion contained in the Opening Brief (page 3, second full paragraph) the trial court found and the evidence

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*Appellants Dixon and Fidelity concede in their opening brief (hereafter Opening Brief) page 3, second full paragraph, lines 3-5, as they must, that "Yost agreed to perform all the physical work which Harris had agreed to perform for Dixon."

supports the finding that Harris had entered into the written agreement [Pltf. Ex. 4] with Yost *prior* to sending back a signed copy of the Dixon contract [Clerk's Transcript (hereafter C. T.) p. 164, lines 2-7; and see R. T. citations in paragraph 6 above].

7. In early July, 1962, Yost and Use plaintiff, Paramount Truck Rental, Inc., (hereafter "Paramount") with which it had orally contracted to supply machinery and labor necessary for Yost to perform his contract with Harris, commenced to work on the job site [R. T. pp. 99, 54, 106].

8. When Yost commenced work on the job site Harris introduced him to Mr. Meyer, the job superintendent for Dixon, as the one who was to be in charge of the work [R. T. 108, lines 9-19; C. T. p. 166, lines 15-17]. Yost or McFarland, a Paramount employee who was the foreman on the job site, or both of them, thereafter daily dealt with Meyer and Meyer never requested that either of them go through Harris [R. T. pp. 97, 109, 101].

9. Dixon learned within a week after work commenced on the job site that Yost was working there under a contract with Harris and not as an employee thereof. [C. T. p. 166, lines 17-19, R. T. pp. 113-114, 126-127].

10. Although Harris was occasionally on the job site [R. T. p. 100] appellants' completely misstate the facts when they baldly assert he was there "supervising". (Op. Br. p. 3, line 2 of the last full paragraph). Indeed, Harris himself was frank to testify and the court below found that he "had no control over Mr. Yost" [R. T. p. 46, line 24; pp. 93-94; C. T. p. 164, lines 7-9] and Mr. McFarland testified that he dealt

only with Mr. Meyer, Dixon's job superintendent or with Mr. Yost, taking his instructions only from either of these gentlemen and not from Mr. Harris [R. T. pp. 98-99]. In the event of any dispute with Dixon, McFarland would go to Yost for it to be straightened out [R. T. p. 101].

11. Harris performed no part of his contract with Dixon. Harris' contractual obligations were performed solely by Yost, or by Paramount, until a dispute later arose with Dixon. [C. T. p. 166, lines 19-22; R. T. pp. 37, line 22, to p. 38, line 13; pp. 107, 100-101, 110-112, 74-81]. Defendant's own documents admit this fact. Thus, Plaintiff Exhibit 9, a letter from Dixon to Harris dated 10-3-62, states in part:

> "We have requested from you . . . releases *from the parties who have heretofore performed all of the actual work completed to date on the site of the subject project.*" (emphasis supplied)

And Plaintiff's Exhibit 15, a letter from Dixon to Yost, states that Paramount ". . . has forwarded to us invoices and supporting documents for equipment used by you in the performance of the subcontract, which is held by Van Harris & Son, for the excavation and backfill work in connection with the construction . . ."

12. In August or September, 1962, a dispute arose between Paramount, Yost and Harris, on the one hand, and Dixon, on the other, concerning Dixon's demand for material and equipment releases from Paramount and Yost "the parties who have heretofore performed all of the actual work completed to date on the site of the subject project" as a condition precedent to making

any further progress payments. [Pltf. Ex. 9, and R. T. pp. 74-81]. As a consequence of the foregoing, Yost and Paramount refused to perform further and walked off the job.

13. However, in October, 1962, Paramount was contacted by Meyer, Dixon's job superintendent, with the request that Paramount deliver some equipment to the job site. Meyer specifically agreed that Dixon would pay the bill for the rental of such equipment if Paramount did not receive payment therefor from Yost. [R. T. pp. 65-67]. In reliance on this promise, Paramount did send equipment to the job site and thereafter did directly bill Dixon [Pltf. Ex. 14], but Dixon failed and refused to pay same, referring Paramount to Yost for payment [Pltf. Ex. 15].

14. Within the time permitted by law, Paramount sent the requisite Miller Act notice to, *inter alia,* Dixon and Fidelity [Pltf. Ex. 16].

15. Ample oral and documentary evidence was introduced by Paramount [Pltf. Ex. 12-14, 17 and R. T. pp. 54-60, 89-92] from which the court could find, and did find, what work was performed by Paramount on the job site, what was the reasonable value of such work, and what was the unpaid balance due on such work. Based upon this evidence the court below entered its Judgment in favor of Paramount and against Dixon and Fidelity, jointly and severally, in the sum of $8,730.87, together with interest thereon at the rate of 7% per annum from October 11, 1962 to March 23, 1965, and costs in the sum of $69.42 [C. T. pp. 177-178] from which Judgment Fidelity and Dixon appeal.

III.
STATUTES INVOLVED.

The applicable sections of the Miller Act, 40 U.S.C. Section 270a, 49 Stat. 793 (1935), as amended, 73 Stat. 279 (1959), which appellee submits is the only statute involved herein, are set forth at pages 5-8 of the Opening Brief herein.

IV.
QUESTIONS PRESENTED.

A. For the purposes of the Miller Act, is Dixon, the Company which furnished the Miller Act bond at issue herein and which contracted to act as general contractor for the construction of the Central Engineering Building at JPL, to be treated as the prime or general contractor under said Act or merely as the first subcontractor by reason of its contract with CIT.

B. Does the Miller Act cover only suppliers or subcontractors who have either a contractual relationship, express or implied, with the contractor furnishing the payment bond or with one of such contractor's subcontractors or does it extend to all subcontractors who actually perform part of the work of construction?

C. Did Paramount have a contractual relationship with Dixon express or implied by reason of (i) the express contract entered into between them in October (see Statement of Case, Paragraph 13, *supra*), or (ii) by reason of its relationship therewith on the job site?

D. Was Harris, who admittedly did not perform any part of his contract with Dixon, merely a "paper subcontractor" who for purposes of the Miller Act, is to be excluded from consideration so that Yost, the party

who along with Paramount performed all of the work done under Harris' subcontract, becomes a subcontractor of Dixon's rather than a sub-subcontractor thereof and Paramount a person having a direct contractual relationship with such a subcontractor.

V.
SUMMARY OF ARGUMENT.

A. Dixon, the company that supplied the subject perfomance bond and that contracted to construct the Central Engineering Building of JPL, is to be treated as the prime or general contractor for the purpose of determining whether or not Paramount had a sufficient nexus therewith to recover under the Miller Act. CIT was nothing more than the supervisory agent of NASA and is not to be considered as the prime or general contractor.

B. The Miller Act does not limit its protection only to suppliers or contractors who have either a contractual relationship, express or implied, with the contractor furnishing the payment bond or with one of such contractor's subcontractors but rather protects all subcontractors who agree to perform and, in fact, do perform any part of the work on the construction project.

C. Paramount's direct contractual relationship with Dixon in October brings *all* of the work done by Paramount on the job site under the protection of the Miller Act. Moreover, even absent the October agreement, there was an implied direct contractual relationship between Paramount and Dixon by reason of their respective activities on the job site, which affords Miller Act protection to Paramount.

D. Since Harris did not, in fact, perform any part of the work on the construction project, he was a mere "paper contractor" who, for Miller Act purposes, must be excluded from consideration, so that for purposes of determining whether there was a sufficient nexus between Paramount and Dixon, Yost's relationship with Dixon must be telescoped to make Yost a subcontractor of Dixon and Paramount then becomes a person having a direct contractual relationship with such a subcontractor.

VI.
ARGUMENT.

A. For Purposes of the Miller Act, Dixon Is to Be Treated as the Prime Contractor.

The Miller Act provides in part (40 U.S.C. Section 270a) that:

> "*Before any contract*, exceeding $2,000 in amount, *for the construction,* alteration, or repair *of any public building of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as 'contractor'*:
>
> "...
>
> "(2) *A payment bond* with the surety or sureties satisfactory to such officer [the officer awarding such contract] *for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person . . .*" (Emphasis supplied).

As demonstrated in the statement of the case, *supra*, the contract to construct the Central Engineering Building at JPL was awarded by CIT to Dixon, after first securing from NASA the requisite task order. Since Dixon was awarded a contract to construct a public building within the meaning of the Miller Act, under the specific terms thereof, Dixon, not CIT, was required to post the requisite payment bond and, of course, by statutory definition Dixon became the contractor. Indeed, in the words of the Trial Court:

> "It seems clear that NASA was treating C.I.T. as its supervisory agent and that Dixon was treated as its prime contractor in connection with the performance of the work outlined in its contract with C.I.T., the only contract between the government and C.I.T. was the Research Development contract; the construction contract was entered into between Dixon and C.I.T. pursuant to the general terms of the R & D contract authorizing the building of facilities by C.I.T. when authorized by the proper governmental representative." [C. T. p. 165, lines 9-17].

The nature of the work to be performed and not the name of the contracting party determines whether or not the bond in question is a Miller Act bond. In *United States v. Phoenix Assurance Co. of New York*, 163 F. Supp. 713 (N.D. Cal. 1958), Judge Oliver J. Carter held that a payment bond furnished to secure the construction of a new post library at the Presideo Army Base in San Francisco pursuant to a contract with the "Special Facility Fund, Building 220, Presidio of San

Francisco, California, a non-appropriated fund activity," was a Miller Act Bond declaring:

> "The test is not whether there was a formal contract in the name of the United States, but whether there was a contract 'for the construction . . . of any public building or public work of the United States'. If the person or agency making the contract for the public building, or public work, on behalf of the United States had the authority to so contract, it is immaterial whether the contract is made in the name of the United States or of such person or agency."

Moreover, it is equally clear both from the *Phoenix Assurance Co.* case and the case of *United States v. Harder Industrial Contractors, Inc.*, 225 F. Supp. 699 (D. Ore. 1963) that the person who contracts to build a public building with either the United States or its agent (in our case CIT) and thereafter supplies the requisite payment bond is the prime or general contractor under the Miller Act for the purpose of determining whether or not a person who seeks to recover on such a bond has a sufficient nexus therewith.

In *Harder*, the United States of America acting through one of its arms (there, the Atomic Energy Commission) entered into a contract with Henry J. Kaiser (Kaiser Engineers Division), a Nevada corporation, for the erection of certain facilities near Richland, Washington. Kaiser as "contractor" thereafter let out bids for the performance of certain work included in the contractor's agreement with the A.E.C. In compliance with the requirements of the contract, Harder, as principal, and General Insurance Co. of America, as surety, posted a payment bond naming

the United States of America and Kaiser as joint obligees thereunder.* Defendants argued that the bond in question was not a Miller Act bond for the following reasons:

> "(1) The Miller Act requires the bond of the prime contractor, rather than the subcontractor, such as Harder, and
>
> (2) The United States must be the sole obligee under a Miller Act bond."

District Judge Kilkenny ruled against defendants on both contentions, reasoning as follows:

Firstly, in respect to the position that the United States must be the only person on such a bond in order for it to be a Miller Act bond, the court held: "I can think of no valid reason why the addition of an obligee should destroy the force and effect of an otherwise valid Miller Act bond. If necessary, the name of the other obligee could well be ignored and treated as mere surplusage" [225 F. Supp. 699 and see C. T. pp. 175-176].

In respect to defendants' other argument, *i.e.,* that the Miller Act requires a bond of the prime contractor rather than the subcontractor, Judge Kilkenny reasoned as follows:

> "The language of the Miller Act, in itself, does not indicate such a conclusion. On the other hand, it has been held that the Act should be liberally construed in favor of those persons who supply material toward the prosecution of the work. *United States for Benefit and on Behalf of Sherman v.*

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*Likewise, in the instant case, the United States and CIT are named under the bond (Pltf. Ex. 2) as joint obligees.

Carter et al., 353 U.S. 210, 77 S.Ct. 793, 1 L.Ed 2d 776 (1957).

The primary purpose of the Miller Act is to protect those who furnish labor or supply material for use in the construction of public buildings or public works of the United States and a liberal construction should be given to effectuate that purpose."

Finally, Judge Kilkenny added in words which are clearly apposite to the instant case:

"It seems rather clear that the Commission was treating Kaiser Engineers as its supervisory agent and that Harder was treated as the prime contractor in connection with the performance of the work outlined in its contract. I conclude that the bond was posted pursuant to the provisions of the Miller Act." (225 F. Supp. at 702).

Harder also patently stands for the proposition that for the purpose of the Miller Act, the person who furnishes the performance bond is to be treated as the contractor for the purpose of determining whether or not the use plaintiff has a sufficient nexus therewith. Since plaintiff there was only the supplier of a subcontractor of Harder's, it would appear that under the *MacEvoy rule* (discussion occurs *infra*, pages 15-17), if the A.E.C. had been treated as the prime or general contractor, plaintiff would not have been entitled to recover on the Miller Act bond, since it then only would have been the supplier of a sub-subcontractor which, under *MacEvoy*, is probably outside the purview of the Miller Act.

And see also *Triangle Electric Supply Co. v. Mojave Electric Co.*, 234 F. Supp. 293 at 308-09 (W.D. Mo. 1964).

Thus, both the unequivocal language of the Miller Act itself and decisional law compel a holding that for purposes of this action, Dixon was and must be treated as the general or prime contractor.

B. The Miller Act Protects All Persons Who Agree to Perform and, in Fact, Do Perform Any Part of the Work of Public Construction Whatever Their Relationship Be With the Prime Contractor.

Appellee is frank to admit that at least one Circuit Court of Appeals, the 5th Circuit, and a handful of federal district courts have held that the Supreme Court decision in *Clifford F. MacEvoy Co. v. United States*, 322 U.S. 102, 64 S. Ct. 890, 88 L. Ed. 1163 (1944) requires one who seeks to come within the purview of the Miller Act, first to establish that he had either a direct contractual relationship with a first tier subcontractor or a contractual relationship, express or implied, with the contractor furnishing the payment bond. But insofar as appellee is aware, this honorable court has not ruled on the question.* In light of this fact, it is respectfully suggested that this court should adopt the rule laid down by District Judge Follmer, in *McGregor Architectural Iron Co. v. Merritt-Chapman & Scott Corp.*, 150 F. Supp. 323 (M.D. Pa. 1957). There, Judge Follmer held that a third-tier subcontractor, *i.e.*, one who had contracted with a sub-subcontractor to perform part of the work on the job site and in fact, did perform such work was protected under the Miller Act.

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*The question is not reached by this court in *Basich Bros. Const. Co. v. United States*, 150 F. 2d 182 (9th Cir. 1946), nor in *Sam Macri & Sons v. U. S. A.*, 313 F. 2d 119 (9th Cir. 1963).

Judge Follmer reasoned:

> "The MacEvoy case is clearly distinguishable. In that case MacEvoy, the prime contractor, purchased from Miller certain building materials for use in the prosecution of the work provided for in MacEvoy's contract with the Government. Miller in turn purchased these materials from Tomkins. Miller failed to pay Tomkins. There was no allegation that Miller agreed to perform or did perform any part of the work on the construction project. The Court spelled out the issue as to whether under the Miller Act a person supplying materials to a materialman of a Government contractor and to whom an unpaid balance is due from the materialman can recover on the payment bond executed by the contractor. The Court held that he cannot." (150 F. Supp. at 324-325)

Judge Follmer also quotes *MacEvoy's* definition of a Miller Act subcontractor, *viz.*: "Under the more technical meaning, as established by usage in the building trades, a subcontractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen." (150 F. Supp. at 325)

As a consequence of the foregoing, and based upon this distinction Judge Follmer concluded:

> "In the instant case, the plaintiff, the third subcontractor, performed two contracts, one for the erection of a bunker, the other for the erection of a stiff leg post and three bridleposts, both of

which were an actual part of the Tobyhanna job and were performed on the site by the plaintiff.

It seems to me that plaintiff certainly qualifies under the wording of the MacEvoy case as one of 'the relatively few subcontractors who perform part of the original contract' and who accordingly 'represent in a sense the prime contractor and are well known to him'. The plaintiff here was not 'an ordinary materialman'.

I find nothing in the Act which would preclude a subcontractor actually performing on the site an integral part of the main contract which was the responsibility of the prime contractor from the beneficent provisions of this Act. As a matter of fact, a study of the legislative history of this Act taken with the expressed view of the Supreme Court in the MacEvoy case that it is to be given a liberal interpretation convinces me that this third subcontractor plaintiff is within the group entitled to protection under the Act." 150 F. Supp. at 326; (Emphasis supplied).

It is respectfully submitted that Judge Follmer's reasoning is persuasive and carries out the broad statutory language and admitted remedial purpose of the Miller Act. That language on its face covers "*every* person who has furnished labor or material in the prosecution of the work provided for in such contract [*i.e.*, to construct a public building]."

MacEvoy should be limited to its peculiar facts as Judge Follmer does in the *McGregor* case which, appellee respectfuly submits, is worthy of adoption by this honorable court.

C. Paramount Had a Direct Contractual Relationship With Dixon Express and Implied, and, Hence, Has Standing to Sue on the Miller Act Bond in Question.

The court below properly found that Paramount furnished equipment to Dixon during October 1962 "upon the direct request of Dixon to Paramount." [C. T. p. 167, line 32, to p. 168, line 3]. Appellants do not dispute the efficacy of this finding but instead argue that the court erred in permitting the introduction of this evidence by reason of the California Statute of Frauds. (Cal. Civil Code § 1624(2)) (See Op. Br. pp. 23-24).

But the argument of appellants again completely misses the mark since what was at issue in the October situation was not a promise on the part of Dixon to answer for an obligation already existing from Yost to Paramount but rather an independent, sole and newly created obligation on the part of Dixon. For prior to Dixon's ordering the work in question from Paramount, Paramount was not required to do such work for Yost nor, of course, did Yost have an obligation to Paramount to pay for such work once done.

This being the case, Dixon's promise to Paramount is not a promise "to answer for the debt, default or miscarriage of another . . ." (Cal. Civ. Code §1624(2)) and is hence not within the Statute of Frauds.

Kilbride v. Moss, 113 Cal. 432, 45 Pac. 812 (1896);

23 Cal. Jur. 2d *Frauds, Statutes of,* Sec. 81;

1 Witkin, *Summary of Cal. Law,* Contracts, Sec. 100;

24 Am. Jur., *Guaranty,* Sec. 3.

Clay v. Walton, 9 Cal. 328 (1858), relied on by Appellants, is clearly distinguishable by reason of the fact that there, in fact, a contract was entered into between plaintiff and the person for whom defendant orally promised he would be responsible should that person fail to live up to his contract. Here, on the other hand, there is no evidence in the record, nor could there be, that a contract was entered into between Yost and Paramount in respect to the work ordered by Dixon in October. This being the case, Dixon's promise to pay for such work is primary and unconditional and, hence, under the authorities cited above not within the Statute of Frauds.

Moreover, and in any event:

> "Since the Statute of Frauds is a 'shield' and not a 'sword', *i.e.,* a defense and not a basis for affirmative action . . . it cannot be used to attack an oral contract which has been fully performed." 1 Witkin, *Summary of California Law,* Contracts, Section 108, and cases cited therein.

Accord,

> *Polliana Homes v. Berney,* 56 Cal. 2d 676, 365 P. 2d 401 (1961);
>
> *Realty Corp. v. Burton,* 162 Cal. App. 2d 44, 57, 327 P. 2d 948 (1958);
>
> *Tobola v. Wholey,* 75 Cal. App. 2d 351, 357, 170 P. 2d 952 (1946);
>
> 23 Cal. Jur. 2d, Frauds, Statutes of, §§ 131-132.

Having established that there was a direct contractual relationship between Paramount and Dixon in October, 1962, the question then becomes, whether this contractual relationship can relate back and cover all of the work that Paramount did for Yost, so that there

would be the requisite contract between Paramount and Dixon under §270b which would sweep all of the work performed by it under the protection of the Miller Act.

While appellee has not found a case squarely in point, it has found a case which it believes presents a persuasive and controlling analogy. In *Noland Co. v. Allied Contractors, Inc.*, 273 F. 2d 917 (4th Cir. 1959) the court held that where a materialman furnished materials from time to time on separate orders, notice to the prime contractor given within ninety days from the date of the delivery under the *last* order was timely as to *all* deliveries in an action brought under the Miller Act, the court reasoning:

> "The notice provision as to the subcontractor in the Miller Act, . . . speaks of a *contractual relationship* between the contractor and the subcontractor, which is broad enough to cover a series of separate contracts or orders relating to the same project" (273 F. 2d at 920).

Accord:

> *United States v. Bregman Construction Corp.*, 172 F. Supp. 517, 522 (E.D.N.Y. 1958).

It is respectfully submitted that the above authorities present a strong analogy to support a holding by this honorable court, particularly in light of the clear remedial aspect of the Miller Act which requires that it be liberally construed (see *e.g., United States v. Carter*, 353 U.S. 210, 1 L. Ed. 2d 776 (1957); *United States v. Kelley*, 327 F. 2d 590 (9th Cir. 1964)) that there

was the requisite direct contractual relationship between Dixon and Paramount.

Secondly, appellee contends that even ignoring the October contract between Dixon and Paramount, there was such a relationship between Mr. McFarland, the Paramount employee and superintendent on the job, and Mr. Meyer, the Dixon job superintendent [R. T. pp. 97, 102, 107-109, 93-94, 37-38] that an implied contract arose between Dixon and Paramount within the meaning of the Miller Act. This is so because on numerous occasions on the job site Meyer and McFarland dealt directly and face to face, McFarland taking instructions directly from Meyer where, on numerous occasions, neither Yost nor, of course, Harris were present.

D. For the Purposes of the Miller Act Harris Is Only a Paper Contractor Who Must Be Ignored and Yost Therefore Must Be Treated as a Subcontractor to the Prime Contractor, Dixon.

As set forth above in the statement of the Case, the facts are and the court found that Harris, although it purported to contract with Dixon to do a portion of the work which Dixon was to perform under its contract with CIT, in fact did no such work but, rather "subcontracted" all of that work to Yost which, in fact, with the aid of Paramount did all such work that was performed on the job. This section of the reply brief shall discuss whether or not in light of these facts and for the purposes of the Miller Act, Harris should be ignored and Yost should be treated as Dixon's subcontractor.

MacEvoy Co. v. United States, supra, relied on most heavily by Dixon and Fidelity herein, contains a learned discussion of what is meant by the term "subcontractor" as used in the Miller Act. That discussion has particular relevance to the case at hand and is as follows:

> "The Miller Act itself makes no attempt to define the word 'subcontractor'. We are thus forced to utilize ordinary judicial tools of definition. Whether the word includes laborers and materialmen is not subject to easy solution, for the word has no single, exact meaning. In a broad, generic sense a subcontractor includes anyone who has a contract to furnish labor or material to the prime contractor. In that the sense Miller was a subcontractor. *But under the more technical meaning, as established by usage in the building trades, a subcontractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen.* To determine which meaning Congress attached to the word in the Miller Act, we must look to the Congressional history of the statute as well as to the practical considerations underlying the Act.
>
> *It is apparent from the hearings before the subcommittee of the House Committee on the Judiciary leading to the adoption of the Miller Act that the participants had in mind a clear distinction between subcontractors and materialmen. . . .*" (Emphasis supplied).

Thus, the pivotal question under *MacEvoy* in determining *Miller* Act status, is not whether there is a contract with the prime contractor, but whether the

contracting party in fact "performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract". If it does not do so, then it is not to be treated as a subcontractor, no matter what its paper relationship with the general or prime contractor be.

A number of cases have so held.

Thus, in *Fine v. Travelers Indemnity Co.,* 233 F. Supp. 672 (W.D. Mo. 1964). S. S. Silberblatt, Inc. contracted with the United States to construct certain military housing and furnished, as principal, the requisite Capehart Act bond, Miller Act standards being expressly made applicable thereto. Under that bond, and under the restrictive interpretation some events have given to *MacEvoy,* only persons who have a direct contract with the principal (*i.e.,* Silberblatt) or with a subcontractor of the principal and who have furnished labor and material in the prosecution of the work provided for in the contract are entitled to recover. Silberblatt subcontracted a portion of its contract to Sterling Brukar, Inc. who in turn subcontracted a portion of its work to W. S. Conner, the latter, in turn, contracting with plaintiff who supplied labor and materials for which it sued to recover under the bond.

The court quite properly reasoned that:

> "MacEvoy held that a 'subcontractor . . . [within the] meaning Congress attached to the word in the Miller Act . . . is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract.' *It would follow that one who does not, in a very real sense, 'perform for' and who does not, in a very real sense, 'take from' the prime*

> *contractor a specific part of the contract is one who is something other than a 'subcontractor', within the meaning of the Miller Act.*" (233 F. Supp. at 679; emphasis supplied).

The court, applying this test, held that plaintiff was entitled to recover on the bond because Brukar was not a real Miller Act subcontractor since it "*did not in fact take from and perform a specific part of the labor or material requirements of the original contract in a manner consistent with the established usage in the construction industry, within the meaning of a 'subcontractor' as defined either in the Capehart Bond or in the Miller Act as explained in MacEvoy*", even though:

> "certain moneys were routed through the corporate books of Sterling Brukar, Inc. . . ." (233 F. Supp. at 681-82).

Likewise applicable is *United States v. Ft. George G. Meade, etc.*, 186 F. Supp. 639 (D.Md. 1960). There, Miller, the prime contractor purported to subcontract its *entire* contract to McCloskey who in turn subcontracted a portion of its contract to Sunbeam. Sunbeam then purchased materials for the job from Acme, the use plaintiff therein. Defendant argued in a suit on the Capehart Act bond, that since plaintiff had no contractual relationship either with the alleged principal, Miller, or with Miller's alleged first subcontractor, McCloskey, it therefore did not have standing to sue on the bond in question. But the court held that if plaintiff could prove that McCloskey was really the prime contractor, *either* by showing the existence of a joint venture *or a complete assignment of Miller's responsibilities to McCloskey*. For then Sunbeam would become a

first subcontractor and McCloskey the prime contractor, and plaintiff would have sufficient standing to recover under the bond even under the restrictive interpretation of *MacEvoy*.

The language used by Judge Watkins in *Ft. George G. Meade* is particularly apposite to the problem before this court for, confronted with defendant's contention that the contractual arrangements control, he stated:

> "The court is not only interested in, but obviously cannot decide the case without, factual information as to the actual relationship between Miller and McCloskey, for on the issue of whether or not the use-plaintiff stands in too remote a relationship to the prime contractor, the *problem before the court is, does substance or form control in determining who is the prime contractor;* that is, whether entitlement to relief is governed by the actual role and function of performance of a party, or is otherwise based on some formal criteria, as the term or the label by which a party may be designated in a contract.
>
> *Substance controls.* In *MacEvoy Co. v. United States,* 1944, 322 U.S. 102, 64 S.Ct. 890, 88 L.Ed. 1163, the Supreme Court looked to the function performed by the plaintiff in relation to the prime contractor." (emphasis supplied).

And in *Continental Casualty Co. v. United States,* 308 F. 2d 846 (5th Cir. 1962), Hal Hayes Texas, Inc. was awarded the prime contract with the government to construct Capehart Act housing. It subcontracted with its subsidiary Winn Contractors, Inc. which in turn subcontracted a portion of the job with Mojave Elec-

tric. Mojave in turn contracted with the use plaintiff which supplied some creosoted utility poles for the job in question. In defense to the use plaintiff's suit on the Capehart Act bond, defendants argued that plaintiff was too far removed from either Hal Hayes Texas, Inc., or its first subcontractor, Winn Contractors, Inc., to recover on the bond. The trial court, however, allowed the jury to decide if Winn was a real subcontractor or only a sham or device or subterfuge and a mere tool of Hal Hayes Texas, Inc. when applied to the Capehart housing project contract in question. The jury decided for plaintiff and the Fifth Circuit affirmed, holding that it was proper to submit this matter to the jury since substance rather than form dictated the question of whether or not the use plaintiff had a sufficient connection to sue on the bond. Moreover, it noted that the evidence in the case made it clear that Winn in no way participated in the fulfillment of Hal Hayes Texas, Inc.'s contract with Mojave Electric.

See also: *Bushman Construction Co. v. Conner,* (10th Cir. 1962), 307 F. 2d 888, which, according to District Judge Oliver writing in the *Fine* case, "illustrates that paper relationships may be telescoped at points other than that between the prime contractor and one of his shadow subcontractors."

These authorities are certainly applicable to the instant case where Harris might not have been even a "paper contractor". [C. T. p. 169, line 12, to p. 170, line 2].

Appellants'sole argument in opposition to this wealth of authority seems to be that (a) on technical contract grounds there was not a total assignment of Harris' contract with Dixon and (b) under general definition

of the term "subcontractor" Yost herein was acting as a subcontractor. (See Opening Brief, pp. 11-20). But this twofold argument totally misses the mark because we are not dealing here with general principles of contract law but rather with the remedial Miller Act and the cases reviewed above clearly require a holding by this court that for Miller Act purposes one who, in fact, has not performed part of the contract on a work of public construction is not to be treated as a subcontractor thereunder, no matter what his paper relationship to the job may have been.

It is most interesting to note that appellants do not even attempt to distinguish the *Fine, Ft. George G. Meade,* and other cases reviewed above which are so clearly applicable herein, since, as appellants themselves admit:

> (i) "Harris delegated all of his duties under the Dixon-Harris subcontract . . ." (Op. Br. p. 15, lines 23-24).
>
> (ii) ". . . Yost performed all the physical labor under the Harris-Dixon subcontract (Op. Br. p. 16, third full paragraph, line 1); and,
>
> (iii) "Dixon knew Harris was using a subcontractor without authorization but did not complain for well over a month." (Op. Br. p. 26, lines 21-23).*

Thus, under the authorities reviewed above and for Miller Act purposes it is respectfully submitted that

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*Appellants do not contend, and it is doubtful that as a matter of law, it is necessary to show that Dixon had such knowledge. *Cf. Glassell-Taylor Co. v. Magnolia Petroleum Co.*, 153 F. 2d 527, 530-31 (5th Cir. 1946); *United States v. Aetna Cas. & Surety Co.*, 56 F. Supp. 431, 434-35 (D. Conn. 1944).

the court must find Harris to be nothing more than a paper contractor who must be telescoped out of the chain, for the purpose of determining Paramount's right to sue on the subject bond.

Conclusion.

The Supreme Court of the United States has often stated that the Miller Act "is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects."

Fleisher Engineering Co. v. United States, 311 U.S. 15, 17, 18;

United States v. Carter, supra.

The Court has also stated:

> "The Miller Act represents a Congressional effort to protect persons supplying labor and material for the construction of federal public buildings in lieu of the protection they might receive under the statutes with respect to the construction of non-federal buildings."
>
> *United States v. Carter,* 353 U.S. at 216, 1 L. Ed 2d at 782.

In order to effectuate this policy and for all of the reasons set forth above, this honorable court should affirm the Judgment of the court below insofar as it awards recovery to Use Plaintiff Paramount under the Miller Act.

Appellant Dixon had within its own power the means to protect itself from the Judgment obtained by Paramount in this lawsuit. It had secured from Harris his

acceptance of Dixon's standard subcontract form [Pltf. Ex. 3] which specifically provides in Paragraph 11 thereof (see Statement of Case, Paragraph 4) that Harris would furnish a labor and material bond in favor of Dixon upon request. As noted in one case (*Triangle Electric Supply Co. v. Mojave Electric Co.* 234 F. Supp. 293, 307 at n. 14 (W.D. Mo. 1964)) the extracting of a payment bond by the prime contractor from his subcontractors has been one of the traditional ways for over half a century by which the prime contractor has protected himself against claims such as those asserted by Paramount in the instant case. Dixon, not having availed itself of the protection afforded to it under its own contract, is entitled to no sympathy herein. Paramount, on the other hand, as one of the class of persons protected by the Miller Act is clearly entitled to recover thereunder.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and, that, in my opinion, the foregoing brief is in full compliance with these rules.

RICHARD H. FLOUM